

RIO GRANDE COMPACT VIOLATIONS

VIOLATION

New Mexico's ever increasing water use and groundwater pumping below Elephant Butte Reservoir (EBR) deprives Texas of water apportioned to it under the 1938 Rio Grande Compact (Compact).

OVERVIEW

The Rio Grande Project (Project) serves the Las Cruces, New Mexico and El Paso, Texas areas and includes Elephant Butte Reservoir. Federal legislation provides for Project water to be allocated 57 percent to Project Lands within New Mexico and 43 percent to Project Lands in Texas. Two districts receive this Project Water—Elephant Butte Irrigation District (EBID) in New Mexico and El Paso County Water Improvement District No. 1 (EP #1) in Texas. A 1938 contract among EBID, EP #1 and the U.S. Bureau of Reclamation (USBR) reflects the 57 percent–43 percent division. The City of El Paso obtains about 50% of its water from EP#1's allocation.

The Compact apportions the waters of the Rio Grande among the signatory states of Colorado, New Mexico, and Texas. The Compact apportions all of the water that New Mexico delivers into Elephant Butte Reservoir to Texas, subject to the United States' Treaty obligation to Mexico and the United States' Project Contract with EBID in New Mexico. The Compact sought to maintain the status quo as it existed in 1938 utilizing the Rio Grande Project as a means to insure that this occurred.

ISSUE

Texas is deprived of water apportioned to it in the Compact because New Mexico has

authorized and permitted wells that have been developed near the Rio Grande in New Mexico. These wells (estimated at over 3,000) pump as much as 270,000 acre-feet of water annually. In addition, New Mexico has permitted wells that would facilitate water use, which in the future will likely significantly exceed these amounts. The pumping has both a direct and indirect effect on Texas' ability to obtain the water the Compact apportioned to it.

In 2008, the United States, EBID and EP#1 finalized an Operating Agreement for the Project. The Operating Agreement acknowledged the 57 percent–43 percent division of Project water and, in effect, established a compromise that both insured delivery of water to Texas and also grandfathered some of New Mexico's historic practices. The Operating Agreement provided Texas and EP#1 protection from some of the depletions to Texas' Rio Grande water caused by pumping in New Mexico. The Operating Agreement was a significant compromise because it was based on data from the 1950s to the 1970s and not the 1938 conditions when the Compact was signed. Texas is not a signatory to the Operating Agreement.

New Mexico, however, filed a lawsuit in New Mexico Federal District Court in August of 2011 (Federal Litigation), challenging the 2008 Operating Agreement. New Mexico later joined EBID and EP#1 in the litigation. In addition to this Federal Litigation, New Mexico is currently adjudicating water rights in the Lower Rio Grande Basin (which includes areas below EBR where Texas' Project water is delivered to EBID and EP#1 through the Rio Grande) in a manner hostile to Texas.

The actions by New Mexico in the Federal Litigation and the Adjudication ignore the Rio Grande Compact and would deprive Texas of the water apportioned to it under the Compact. New Mexico's development of groundwater wells is similar to actions dealt with in other Supreme Court disputes, including action on the Pecos River Compact (*Texas v. New Mexico*) and the Arkansas River Compact (*Kansas v. Colorado*). The Supreme Court has ruled favorably

with Texas' position in these cases.

New Mexico has over-appropriated water to users in New Mexico. The only way New Mexico can supply this water within New Mexico is to deplete the amount of water apportioned to Texas.

TEXAS' ACTION

In January 2013, Texas filed a motion with the U. S. Supreme Court seeking leave to file its Complaint against New Mexico. The Court asked the United States to present its views on the issue. The United States, in December 2013, filed a brief articulating its views and recommending that the Court grant Texas' motion. The Court granted Texas' motion and accepted the case in January 2014. The case is No. 141, Original Action in the Supreme Court of the United States. In February 2014, the United States filed a motion to intervene in the case as a plaintiff closely aligned with Texas, and also raised additional issues that attack New Mexico's permitting of groundwater. The Court granted the United States' motion to intervene. Both Texas and the United States' motions had been opposed by New Mexico. In April, New Mexico filed a motion to dismiss the litigation. The motion has been fully briefed but the Court has not ruled on New Mexico's motion. Rather, the Court appointed a Special Master to review the motion and provide its recommendations and to otherwise preside over the case. This is customary in original actions. Oral arguments on New Mexico's Motion to Dismiss were heard by the Special Master in New Orleans August 19-20.

On July 1, 2016, the Special Master issued a draft Report recommending that the New Mexico motion to dismiss be denied. The draft Report adopted almost all of Texas' arguments. The draft Report, in all respects, was very favorable to Texas. Comments on the draft Report were filed with the Special Master on August 1, 2016. The Special Master filed his final Report with the Supreme Court February 13, 2017. He recommended denying New Mexico's motion to

dismiss. A summary of his report has been included in the committee materials.

EBID and EP#1 both filed motions to Intervene. EBID had filed its motion first and it had previously been referred to the Special Master. The Special Master heard oral argument on the EBID Motion to Intervene on August 20, 2015. The Special Master declined to hear argument on the EP#1 motion since it dealt with the same issues raised in the EBID motion. The Special Master filed his final Report with the Supreme Court February 13, 2017. He recommended denying the motions to intervene. A summary of his report has been included in the committee materials.

A full litigation schedule will be developed as soon as the Motion to Dismiss and the Motions to Intervene are finally dealt with by the Supreme Court. The Special Master has been very slow in addressing issues in this case. It has been over two years since his appointment and the case is still not at issue. This issue was raised with the Special Master during the oral arguments in August 2015 and again after the draft Report was provided to the Parties, but, to date, his rulings are still pending. As a consequence, the case is proceeding slower than hoped at this point. Nonetheless, Texas is confident all pending motions will be denied by the Special Master and the Supreme Court. Once this occurs we believe the case will proceed at a normal pace. Texas continues to develop its case and will push to have the case tried at the earliest possible time.

Special Masters are called upon in Original Actions to weigh the facts and legal arguments that are at issue. This involves sifting through briefs and pleadings by the parties, but it may also involve the trial on factual issues. These trials may be limited to arguments by the lawyers, but they also include testimony from witnesses and the amassing of thousands of pages of transcript and record. The procedures followed will be decided by the Special Masters. In essence, the Special Master acts as the trial judge.

In typical Original Actions, the Special Master files a report with the Court. The report contains the Special Masters recommendations on how the case should be decided and deals with both legal and factual issues. The lawyers on both sides may then file exceptions to the Special Master's Report (briefs challenging the Special Master's findings and conclusions). The Supreme Court will then decide whether to accept the views of the Special Master or to modify the Special Master's determination. This is usually done after oral arguments before the Court over the specific exceptions to the Special Master's Report.